SINGAPORE REPORTS

Bima Investment Pte Ltd v Hong Fok Realty Pte Ltd

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 1409 OF 1985
LAI KEW CHAI J
28 FEBRUARY 1990

Contract — Breach — Contract for sale of warehouse — Suits by third parties against plaintiffs — Whether plaintiffs should receive indemnity in present suit — Affirmation — Whether plaintiffs' act amounted to such — Damages — Management time of plaintiffs incurred in dealing with case

Land Law — Sale and purchase of warehouse unit — Water seepage — Affirmation — Plaintiffs acting to protect lien

The plaintiffs, who purchased a warehouse unit in a warehouse complex from the defendants under an agreement for sale and purchase ('the agreement'), are claiming rescission of the agreement because a part of the unit suffered from waste water seepage, return of the moneys paid thereunder, and damages arising of the rescission of the agreement and out of the loss of use of the area suffered. They also claim to be indemnified against claims by third parties whose goods stored at the unit were damaged as a result of the bursting of a pipe. By reason of the above-mentioned damage, the plaintiffs have been exposed to liability to third parties on account of damage to the goods of the third parties who had stored them in the unit. It is not disputed that the plaintiffs had joined the defendants as third parties in all four sets of proceedings in the subordinate courts (under district court summonses).

Held, allowing the plaintiffs' claims in part:

(1) Where the property which the defendants as vendors have agreed to convey is not substantially the same as the property contracted to be sold, the plaintiffs as purchasers are entitled to repudiate. They may not repudiate for trifling defects which may properly be matters for compensation.

(2) In the court's judgment, the plaintiffs would not be getting a warehouse unit which they had agreed to buy. The unit suffered from and is still suffering from the serious problem of seepage of waste matter which affected and would continue to affect some 38.55% of the unit and the defendants have failed to rectify the cause or causes of the seepage.

(3) The court did not accept the plaintiffs' conduct as acts of affirmation, as submitted by the defendants. First, the plaintiffs at all material times did not know of the structural defects which were mentioned by the engineers. Secondly, the plaintiffs had remained in possession in exercise of their lien for the extent of the purchase price which they had paid and their payment of the maintenance charges were consistent with their maintenance of their lien and not necessarily with the affirmation of the agreement.

(4) As for damages, the serious problem of seepage had continued after December 1986 and is still continuing and the claim for loss of use of both the areas directly and indirectly affected should be allowed. It will be the storage charges which the plaintiffs would have earned from bailors of goods using that part of the unit. The court ordered that the amount of compensation should be assessed by the registrar and in doing so, the plaintiffs should not be allowed to claim reimbursement of the maintenance charges which they had paid as such bailors of goods would not have paid a proportion of the maintenance charges.

(5) The court would disallow the plaintiffs' claim of $1,000 per month for management time as it had not arisen directly and naturally from the defendants' breach of the agreement.

[*Editorial Note*: The defendants have appealed to the Court of Appeal vide Civil Appeal No 29 of 1990.]

Case referred to

1 *Shepherd* v *Croft* [1911] 1 Ch 521 (folld)

SH Almenoar for the plaintiffs.
Joseph Ang for the defendants.

Cur Adv Vult

Lai Kew Chai J: The plaintiffs, who purchased a warehouse unit in a warehouse complex from the defendants under an agreement for sale and purchase ('the agreement') dated 4 August 1983, are claiming rescission of the agreement because a part of the unit suffered from waste water seepage, return of the moneys paid thereunder, and damages arising of the rescission of the agreement and out of the loss of use of the area affected. They also claim to be indemnified against claims by third parties whose goods stored at the unit were damaged as a result of the bursting of a pipe on 6 July 1985. The defendants admit that there had been waste water seepage which they say they had remedied by December 1986, although they took some time carrying out the repairs. They say that the plaintiffs are not entitled to rescind and that the damages are not anything like the amounts claimed by the plaintiffs.

The defendants were the developers of the warehouse complex known as Henderson Industrial Park. By the agreement, the plaintiffs agreed to purchase and the defendants agreed to build and sell a warehouse unit within the second level of the complex, which unit was later numbered as 203, Henderson Road #02-06, Henderson Industrial Park, Singapore 0315 ('the unit') at the price of $1,075,200. The area of the unit was 3,584 sq ft. The plaintiffs took possession of the unit on 14 December 1984 after having paid $806,400 or 75% of the purchase price. Before taking possession, the plaintiffs were served by the defendants a notice to take possession and copies of the defendants' architect's certificate of practical completion and the temporary occupation licence as required by cll 4(1)(j) and 13(2) of the agreement. These documents certified that the unit was fit for occupation. After taking possession, the plaintiffs paid monthly the sum of $501.76 being the maintenance and service charges. They were also liable to pay the property tax which they duly paid.

By early February 1985, the plaintiffs discovered that there was water leakage from the pipes located at one part of the ceiling of the unit and that waste water was seeping through the concrete ceiling. Water stains and dampness as shown by the presence of mould were seen on the ceiling

of the affected portion. The presence of a small puddle of water immediately below the area of the affected ceiling also confirmed that water was seeping through the ceiling. These problems were brought to the attention of the defendants. The plaintiffs complained that between January and June 1985, not less than six attempts were made to remedy the defects but they were all to no avail. The plaintiffs had also repeatedly asked for information as to the cause of the leakage and seepage. But the defendants did not answer this query. But the defendants did not answer this query. They attempted to remedy the defects. In their letter dated 2 July 1985, the defendants by their letter expressed their belief that after several attempts at rectification their 'latest rectification should be effective in stopping the leakage.' That belief proved to be optimistic, if not unwarranted. The plaintiffs pointed out the 'water' that seeped through came from the toilets situated immediately above the unit and were somewhat polluted and that the foul smell made the problem rather serious. Since they did not receive any satisfactory explanation from the defendants about the cause of the waste water leakage and seepage through the ceiling, the plaintiffs thought that it was due to some 'design defect' or some other defect which had to be drawn to the attention of the building authorities. They accordingly wrote to the Deputy Director of the Development and Building Control Division.

The plaintiffs' case is that the defects, which were serious, were not made good by 15 October 1985 and the plaintiffs had no alternative but to rescind the agreement. By their earlier letter dated 22 August 1985, the plaintiffs had estimated that their loss was about $75,000 and stated that they had tolerated long enough the leakage and seepage of 'excremental water and substance' which was even then continuing, in spite of seven attempts to remedy the defects. They even offered to accept an alternative warehouse unit from the defendants. On the other hand, the defendants by their letter of 4 October 1985 maintained that they effectively repaired the defects and that since the fresh coats of paints on 29 August 1985, there was 'no further indication of seepage as at 11 September 1985' when parties jointly inspected the ceiling. That claim was disputed by the plaintiffs whose solicitors by their letter dated 8 October 1985 stated firmly that there was still seepage.

On 3 January 1986, after the notice of rescission, the plaintiffs' solicitors again complained to the defendants' solicitors of seepage 'which manifested itself in an extensive pool of water on the floor.' One Fred Gan, the then assistant property manager of the defendants, was said to have inspected the seepage and had enquired of the cause of the seepage. Entirely without prejudice to the notice of rescission, the plaintiffs' solicitors indicated that they would be interested to know of the cause. By their telex of 23 January 1986, the defendants' solicitors stated that the leakage was 'due to seepage of water through the RC floor cracks around the floor trap in the toilet above [the plaintiffs'] unit.' They further stated that although water had collected on the floor, it was not true that there was an extensive pool of water. They further claimed that the defendants had immediately remedied the defect and that since the completion of the rectification on 4 January 1986, there had been no further leakage.

An incident of a burst pipe which was not connected with the water leakage and seepage defect added to the frustration of the plaintiffs. On Saturday, 6 July 1985, a L-shaped pipe had burst. This L-shaped pipe could be seen protruding below the ceiling near where the water seepage was taking place. It served one of the pipes which were carrying raw sewage from the toilets of the ten floors on top of the unit. Some broken pieces of bricks were found on the floor. Mr George Fong Wah, an expert witness who is a mechanical and chemical engineer, said that the fracture could have been caused in two ways. First, by a falling brick, which had to be thrown into the pipe from the top of the pipe as other sources were only through the toilet bowl pipes at other floors above where the U-bend pipes would have impeded the fall of the brick. Secondly, an iron rod/bar was inserted into the inspection port to fracture it. This had to be done from within the unit. From the evidence I infer and find that pieces of brick had been thrown into the pipe from a height and, as a result, the L-shaped pipe at its turn was damaged and torn. The defendants were developing the property and were in possession of the complex. The defendants have not given any explanation for the presence of the pieces of brick which must have been thrown from the top of the pipe. I do not accept that the damage was caused by any act of vandalism or malicious mischief committed from within the unit in the possession of the plaintiffs. As a result, excremental water and substance were strewn all over the unit below the L-shaped pipe and goods were damaged. The defendants repaired the L-shaped pipe and offered the plaintiffs the use of a neighbouring warehouse unit #02-08 at the same level to store some of their goods.

By reason of the above-mentioned damage, the plaintiffs have been exposed to liability to third parties on account of the damage to the goods of the third parties who had stored them in the unit. The four third parties who had obtained judgments against the plaintiffs in the subordinate courts were Somedico (Pte) Ltd, Family Affair Enterprises Pte Ltd, Patricia Howe Tsan Peck and Build Power Services (S) Pte Limited in DC Suit 7817 of 1986, DC Suit 7824 of 1986 , DC Suit 7823 of 1986 and DC Suit 7822 of 1986. However, it is not disputed that the plaintiffs had joined the defendants as third parties in all four sets of proceedings in the subordinate courts. The liability or otherwise of the defendants should be resolved in those proceedings.

So far as the history of the complaints, the repairs carried out and their effectiveness or otherwise are concerned, I shall now turn to and recite the evidence of Fred Gan Cheng Hock. He was employed by the defendants as an assistant property manager of the Property Maintenance Department. He joined the defendants in January 1984 and left their employ in February 1987 to join the HDB. He was most intimately concerned with the rectification works carried out. By the time when he gave evidence, he was no longer in the employ of the defendants. He very usefully prepared a chronology of events dealing with the leakages and rectification. It was admitted and marked exh D2. He attached to the chronology a plan of the layout of the third level directly above the unit which was, as I had said, on the second level. The plan shows that the affected area of the ceiling lies directly below two rows of toilets of four WCs and three WCs situated one level above. According to Fred Gan, the plaintiffs complained of a leak at the location marked 'A' on the plan. The leak appeared to be through the service duct. It should also be noted that the service ducts are all structurally gathered below the area of the affected portion of the ceiling from where the service ducts were horizontally diverted from the unit along the ceiling. By his letter (exh DAB6A) of 26 June 1985 to the main contractors of the project, the resident architect, having studied the problems, made the obvious observation that 'all the joints and cleaning eyes of the UPVC waste pipes must be carefully checked for ensuring [that they are] completely water-tight'. He also summarized the problem areas in the following terms:

> (2) There are two main stacks [of] bending out through the slab over that unit, which are collecting waste water from each toilet in every storey. Any leakage if occurring from the branches of the waste pipes joining to it from the toilets in upper storeys would convey to these two stacks and shall flow to the RC slab at the bottom of the shaft located right above this unit. Caution must be taken to prevent any stagnant water in the shafts.
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> (3) Any sign of leaking from the copper water pipes concealed in the walls for the toilets in the 3rd storey ought to be traced out and properly be remedied. Otherwise the leakage would seep through the slabs then damp the painting on the soffit.

It will be seen therefore that the affected area of the ceiling is structurally located in such a way that there were and are three potential sources of waste water which could leak and seep through the ceiling. They are (1) joint leaks in view of the number of ducts in the area; (2) the junction of the ducts which would gather the water and other effluent from all the pipes and joints serving the toilets in the upper ten floors; and (3) joint and floor leaks through the floor slabs from the two sets of toilets on the third level which contain seven WCs.

Fred Gan said in evidence that as the complaint of leakage and seepage was received during the defects liability period, he referred it to the projects department of the defendants which, in turn, instructed the main contractors, known as Maincon, to remedy the defect. Maincon was a company related to the defendants. In spite of their clear contractual obligations under cl 22 of the agreement to make good within one calendar month of their having received written notice thereof from the plaintiffs, the defendants' remedial actions were ad hoc and were not carried out in earnest. It was clear from the evidence of the employees of the defendants that the serious problems of leakage and seepage of waste matter were known to the defendants long before they handed possession of the unit to the plaintiffs. After repeated verbal and several written complaints from the plaintiffs, they remedied the joint leaks and erected a concrete slab laid to fall in the service duct just above the third level so that any leakage in the service duct could be diverted to flow through the sewage system in the toilets at the third level. It was only after the notice of rescission that the defendants engaged Testconsult Cebtp Pte Ltd to determine the extent of the seepage. In April 1986, they inundated the floor area immediately above the unit under approximately 20-40mm of water containing a coloured dye, and left it in that condition for a minimum of three days. However, the areas in the immediate vicinity of the squatting pans in both the male and female common toilets on the third level were not subject to inundation. Pierre Vuillemin, of Testconsult Cebtp Pte Ltd, in evidence said that the squatting pans were observed to be quite efficiently laid to fall and that there was no sign of seepage at the soffit of these locations. The results of their investigations revealed that there were signs of seepages occurring 'through the reinforced concrete slab immediately above the premises, at three locations; two of which were at the jointing where UPVC pipes pass through the RC slab, and a third location at the base of the mechanical shaft which terminates on the third floor.' According to Fred Gan, remedial action was taken. Unfortunately, the seepage continued. I visited the unit in October 1986 and I found there was seepage. The case was thereafter part heard. At the resumed hearing, counsel for the plaintiffs had repeatedly alleged that the serious problem of seepage of waste matter, with its attendant foulness in the air, was still present and there has been no riposte from the defendants.

Counsel for the plaintiffs then submitted that the serious problem has arisen and is continuing because of a structural defect. For this submission, he refers to a letter dated 24 September 1984 written by the defendants' own civil and structural consulting engineers relating to the cracks which had appeared in the floor slabs of the warehouse block in which the unit is located. The letter was addressed to the main contractors and copied to the defendants. It was not revealed to Fred Gan nor to the plaintiffs and they knew of its existence only at the trial. It stated:

Dear Sir

Henderson Industrial Park — Cracks in the floor slabs of Blk 8

We refer to our previous correspondence and discussions on the cracks existing on various floors of the above-mentioned building block. As per our recent site investigation, we have found that the top reinforcement bars at these locations were not provided in accordance with the contract drawings. Furthermore, at other locations examined, we have also found that the concrete covers were as much as 70 mm. Obviously your non-compliance with the contract drawings and unsatisfactory work has resulted in the said undesirable cracks.

Water has leaked through these cracks to the lower floors whenever the floors are wet. This is a serious matter in terms of structural defect as well as creating a perpetual problem on the leakage to tenants and/or purchasers/users when the building is in operation.

You are therefore instructed to submit immediate serious rectification proposals to remedy the above-said serious structural defect. Furthermore, we would like to place in record that you will be fully responsible for any consequences arising out of this issue.

By way of a copy of this letter to Hong Fok Realty, architect and quantity surveyor, we deem that they will take whatever relevant and prompt action that they think necessary.

Yours faithfully
Tan Ee Ping & Partners

Sgd: Tan Ee Ping

Following this letter, the defendants and the main contractors met. Eventually, the engineers agreed to recommend the issue of the certificate of practical completion on engineering works after the main contractors had confirmed their responsibility to the defendants 'to carry out any future repair and maintenance works (eg patching up)' as set out by the engineers in separate correspondence. In relation to the unit, the concrete slabs above the unit are afflicted by the same defects. In addition, it is still in question if the squatting pans in the two common toilets on the third level have been rendered water-proof. The inescapable fact is that the serious problem of seepage of waste water, with its attendant foulness, remains. I reject the defendants' claim that the problem of seepage has been remedied.

Counsel for the plaintiffs further submitted that on the evidence that the area directly affected by the seepage was 476 sq ft and that the area indirectly affected was 904.92 sq ft. If this submission is right, the total area of the unit affected by the seepage, not to mention the foulness of the air, would be 38.55% or, in money terms, the plaintiffs would have paid $414,276 for that part of the unit which was and is directly and indirectly affected by the serious problem of seepage of waste water. In reply, counsel for the defendants submitted that the plaintiffs could have partitioned that part of the unit indirectly affected by the seepage. In my view, this was not a commercial alternative which the plaintiffs were obliged to adopt.

I now turn to the right of the plaintiffs as the purchasers to repudiate the agreement and to enforce rescission by the judgment of this court, as they assert. Where the property which the defendants as vendors have agreed to convey is not substantially the same as the property contracted to be sold, the plaintiffs as purchasers are entitled to repudiate. They may not repudiate for trifling defects which may properly be matters for compensation. (See 42 *Halsbury's Laws of England* (4th Ed) para 249.) *In Shepherd* v *Croft*[1] Parker J at p 527 said:

> In order to see whether the case is within *Flight* v *Booth* (1834) 1 Bing (NC) 370, I have to ask myself whether, if specific performance were granted, the defendant would be getting something different from that which the plaintiffs contracted to give her. If this be so, then, according to *Flight* v *Booth*, notwithstanding cl 11 of the conditions, the defendant will have the right to rescind the contract. If, however, on the other hand, the defendant, if I were to decree specific performance, would be getting substantially what the plaintiffs contracted to give her, then *Flight* v *Booth* would have no application at all. For the purpose of answering the question, it appears to me that I am bound to consider the terms of the contract itself, and if the defendant purchased for any particular purpose which was known to the plaintiffs, I have to consider the purpose for which she purchased the property.

In my judgment, the plaintiffs were and would not be getting a warehouse unit which they had agreed to buy. The unit suffered from and is still suffering from the serious problem of seepage of waste matter which affected and would continue to affect some 38.55% of the unit unless the defendants effectively rectified the cause or causes of seepage mentioned by their engineers and make the toilets on the third level water-proof. They have failed to do so.

Counsel for the defendants submitted that the plaintiffs had, with the knowledge of the breach, elected to affirm the agreement and was therefore not entitled to repudiate the agreement. He pointed out that the plaintiffs' employee, Patricia Howe, had after the notice of rescission complained of further leakage and had accepted the rectification works carried out on 4 January 1986. Further, the plaintiffs' solicitors had asked for the record of the seepage, which request, however, was made 'entirely without prejudice'. Counsel also relied on the fact that the plaintiffs had since the notice of rescission remained in possession and had paid the monthly maintenance charges. I do not accept these acts as acts of affirmation of the agreement. First, the plaintiffs at all material times did not know of the structural defects which were mentioned by the engineers. Secondly, the plaintiffs had remained in possession in exercise of their lien for the extent of the purchase price which they had paid and their payment of the maintenance charges were consistent with

their maintenance of their lien and not necessarily with the affirmation of the agreement.

I now turn to the plaintiffs' claims for damages. In view of my finding that the serious problem of seepage had continued after December 1986 and is still continuing, the claim for loss of use of both the areas directly and indirectly affected should be allowed. It will be the storage charges which the plaintiffs would have earned from bailors of goods using that part of the unit. I order that the amount of compensation should be assessed by the registrar and in doing so the plaintiffs should not be allowed to claim reimbursement of the maintenance charges which they had paid as such bailors of goods would not have paid a proportion of the maintenance charges. I also disallow the plaintiffs' claim of $1,000 per month for management time as it had not arisen directly and naturally from the defendants' breach of the agreement. In relation to the claim for a declaration of indemnity in respect of the four district court summonses, I also do not make the declaration sought by the plaintiffs for the reasons mentioned earlier in this judgment.

However, I do allow the plaintiffs' claims for reliefs under prayers 1, 2, 3, 4, 6, 7, 9, 10, 12, and 13 as set out in the plaintiffs' amended statement of claim. I also order that the registrar conduct the inquiries and assess the amounts payable by the defendants to the plaintiffs as prayed for in prayers 5, 8 and 11 of the amended statement of claim. I still want to hear arguments about any interest payable by the defendants to the plaintiffs by reason of the orders I have made in this case. As the plaintiffs have succeeded in most of their claims, I order the defendants to pay the costs of these proceedings to the plaintiffs. Counsel for both parties are directed to settle the draft judgment of this court for my approval after I have disposed of the question of the interest payable.

Order accordingly.

Solicitors: *Tan Rajah & Cheah; Lee & Lee.*

Reported by *Terence Tan Bian Chye*

Chow Dih v Public Prosecutor

HIGH COURT (SINGAPORE) — MAGISTRATE'S APPEAL NO 451 OF 1985
CHAO HICK TIN JC
2 FEBRUARY 1990

Criminal Law — Cheating — Doctor deceiving patients into believing that they suffered from serious diseases — Payments by patients for treatment for genuine and bogus medical problems — Whether charge had to specify proportion of payment in respect of cheating — Whether deception induced continued consultation — Penal Code (Cap 103, 1970 Ed), s 420 — Criminal Procedure Code (Cap 113, 1970 Ed), ss 18, 256 & 396

The appellant was tried before the senior district judge and convicted of six amended charges of cheating under s 420 of the Penal Code (Cap 103, 1970 Ed). The charges alleged that the appellant had cheated six patients of specified sums of money over different periods, by deceiving them into believing that they were suffering from various serious diseases. The appellant submitted that the convictions were bad and wrong in law for two main reasons: (1) the sums stated in each charge failed to take into account the amount which was rightfully due to the appellant in respect of the treatment properly given to each patient and which had nothing to do with any deception; (2) there was no evidence to show that the deception was the effective cause for the patients to keep returning to the appellant to receive treatment; on the contrary, the evidence showed that, notwithstanding the deception, each patient was treated for his actual ailment(s) which was the real reason why he or she returned to the appellant for treatment.

Held, dismissing the appeals against conviction and sentence:

(1) If the appellant's submission that the charge had to take into account the amount of money which was rightfully due to the appellant in respect of proper treatment was correct, then it would mean that a doctor who practised deception like the appellant could not be charged for cheating because the prosecution would never be able to prove what the illegitimate portion of the fee demanded was unless the doctor gave a breakdown to the patient when payment was made.

(2) Even if the court were wrong to have so held, the court was of the view that the error relating to the sums involved is inconsequential and by virtue of s 396 of the CPC, the conviction recorded should not be set aside. The court had to consider, before applying this provision, whether the error has occasioned a failure of justice. If the appellant was prejudiced in his defence by the error, that would be an indication that there was such a failure.

(3) In determining whether any error had occasioned a failure of justice, the court was entitled to take into consideration the fact whether the objection could and should have been raised at an earlier stage of the proceedings.

(4) As far as the court can see, the appellant knew full well the charges he had to meet. Not only has the court been unable to see any prejudice to the appellant, but for the reasons alluded to before, the appellant is the only person who would know for sure what portion of the fee paid by each patient on each visit was on account of his deception.

(5) To attract the application of s 420, however, it is not necessary that the representations made by the accused should be the sole cause of the damage or loss. It is sufficient if the complainant was partly and materially, though not entirely, influenced by the false pretences of the accused.